No. 06-427

# In The
# Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
*Petitioner,*

v.

BRENTWOOD ACADEMY,
*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

## BRIEF FOR RESPONDENT


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## QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Circuit correctly held that TSSAA violated the First Amendment and Due Process rights of Brentwood Academy when it imposed penalties for Brentwood Academy's pure speech communications with incoming students and their parents.

## RULE 29.6 STATEMENT

Respondent Brentwood Academy does not have a parent corporation, and no publicly-held company owns 10% or more of BA's capital stock.

## TABLE OF CONTENTS

**Page**

QUESTIONS PRESENTED FOR REVIEW ..... i

RULE 29.6 STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

STATEMENT OF THE CASE ..... 1

Overview ..... 1

The Recruiting Rule And Its Interpretation ..... 10

The Content-Neutrality Issue ..... 13

Non-Speech Alternatives ..... 14

The TSSAA Procedures ..... 15

SUMMARY OF ARGUMENT ..... 17

ARGUMENT ..... 18

In General ..... 18

The TPM Defense ..... 20

I. Heightened Scrutiny Applies To TSSAA's Use Of The Recruiting Rule On Pure Speech ..... 22

A. TSSAA Is A State Regulator ..... 22

1. The State Action Holding .....22

2. The Source Of Government Authority Does Not Determine TSSAA's Regulatory Capacity .....23

B. TSSAA Violated Basic First Amendment Doctrine.....29

II. TSSAA Merits No Special Dispensation from Traditional First Amendment Doctrine.....33

A. TSSAA's Waiver Analysis Is Flawed.....33

B. TSSAA Penalized The Exercise Of Basic Rights .....36

C. The Public Employee Doctrine Does Not Authorize TSSAA's Regulatory Conduct.....39

D. TSSAA Cannot Define Away Brentwood's First Amendment Rights .....42

III. The Recruiting Rule Is Open To Facial Challenge. .....44

IV. TSSAA Violated Procedural Due Process.....47

CONCLUSION .....50

APPENDIX

## TABLE OF AUTHORITIES

**Page(s)**

Federal Cases

*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) ... 7

*Abood v. Detroit Board of Education*, 431 U.S. 209 (1976) ... 28

*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) ... 20

*Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) ... 29, 46

*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) ... 23, 24, 25

*Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) ... 36, 40

*Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) ... 27, 28

*Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) ... passim

*Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 442 F.3d 410 (6th Cir. 2006) ... passim

*Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 262 F.3d 543 (6th Cir. 2001) ... passim

*Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 304 F. Supp. 2d 981 (M.D. Tenn. 2003)..... passim

*Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998)..... passim

*Burson v. Freeman*, 504 U.S. 191 (1992)..... 45

*Carey v. Brown*, 447 U.S. 455 (1980)..... 20

*City of Ladue v. Gilleo*, 512 U.S. 43 (1994)..... 8-9, 32

*City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)..... 30, 46

*City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004)..... 45

*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)..... 32

*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)..... 16, 42, 47, 48, 50

*Consolidated Edison Co. of N.Y. v. Public Service Commission of N.Y.*, 477 U.S. 530 (1980)..... 20

*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)..... 19

*D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972)..... 34, 35

*Dunn v. Blumstein*, 405 U.S. 330 (1972)..... 37

*Edenfield v. Fane*, 507 U.S. 761 (1993)..... 5, 32

*First National Bank of Boston v. Bellotti*,
435 U.S. 765 (1978) ..... 5, 7, 18, 28, 36, 42

*Forsyth County v. Nationalist Movement*,
505 U.S. 123 (1992) ..... 20, 21, 26, 31, 32, 46

*Fuentes v. Shevin*, 407 U.S. 67 (1972) ..... 34, 35

*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) ..... 40

*Greene v. McElroy*, 360 U.S. 474 (1959) ..... 47

*Grove City College v. Bell*, 465 U.S. 555 (1984) ..... 38

*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) ..... 17, 50

*Harris v. McRae*, 448 U.S. 297 (1980) ..... 37

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) ..... 4

*Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*,
512 U.S. 136 (1994) ..... 26, 27, 39, 41, 43, 45

*In re Primus*, 436 U.S. 412 (1978) ..... 32, 44, 45

*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ..... 18

*Keller v. State Bar*, 496 U.S. 1 (1990) ..... 28

*Landmark Communications, Inc. v. Virginia*,
435 U.S. 829 (1978) ..... 19

*Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) .... 42

*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) ..... 10, 13, 30

*Magee v. United States*, 93 F. Supp. 2d 161 (D.R.I. 2000).... 3

*Maher v. Roe*, 432 U.S. 464, 475 (1977) ..... 37

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 16, 17, 47, 49, 50

*Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)..... 45

*Meyer v. Grant*, 486 U.S. 414 (1988) ..... 5, 33

*New York State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998) ..... 3

*O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) ..... 36, 39

*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) ..... 44

*Overton v. Bazzetta*, 539 U.S. 126 (2003) ..... 9, 24

*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) ..... 42

*Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990)..... 19

*Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)..... 6

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) ..... 9

*Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972) ..... 19, 20

*R.A.V. v. St. Paul*, 505 U.S. 377 (1992) ..... 19

*Randall v. Sorrell*, 126 S. Ct. 2479 (2006) ..... 45

*Reno v. ACLU*, 521 U.S. 844 (1997) ..... 33

*Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ..... 5, 7, 8

*Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) ..... 28

*Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ..... 6, 30

*Rust v. Sullivan*, 500 U.S. 173 (1991) ..... 37, 38, 39

*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) .. 37

*Shaw v. Murphy*, 532 U.S. 223 (2001) ..... 24

*Shelton v. Tucker*, 364 U.S. 479 (1960) ..... 19

*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991) ..... 20

*Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) ..... 19

*Snepp v. United States*, 444 U.S. 507 (1980) ..... 35

*South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) ..... 38

*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) ..... 25, 26, 28, 29

*Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ..... 19

*Texas v. Johnson*, 491 U.S. 397 (1989) ..... 6

*The Tool Box v. Ogden City Corp.*, 355 F.3d 1236 (10th Cir. 2004) ..... 28

*Thomas v. Chicago Park District*, 534 U.S. 316 (2002) ..... 14, 19, 21, 26, 31, 32

*Thomas v. Collins*, 323 U.S. 516 (1945) ..... 19

*Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) ..... 29, 32

*Thornburgh v. Abbott*, 490 U.S. 401 (1989) ..... 9

*Turner v. Safley*, 482 U.S. 78 (1987) ..... 9

*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ..... 19

*United States v. Aguilar*, 515 U.S. 593 (1995) ..... 18

*United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003) ..... 39

*United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) ..... 18, 19, 20, 28, 29

*United States v. Salerno*, 481 U.S. 739 (1987) ..... 43, 46

*Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980) ..... 47

*Virginia v. Black*, 538 U.S. 343 (2003) ..... 6

*Virginia v. Hicks*, 539 U.S. 113 (2003) ..... 46

*Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ..... 30

*Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002) ..... 46, 47

*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) ..... 42

*West Virginia State Board of Education v. Barnettte*, 319 U.S. 624 (1943) ..... 27

*Widmar v. Vincent*, 454 U.S. 263 (1981) ..... 28

*Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ..... 45

Federal Rules

Fed. R. Civ. P. 8(c) ..... 33

## STATEMENT OF THE CASE

This case is not about whether the state can limit athletic recruiting. All agree that preventing the exploitation of middle and high school students justifies some reasonable limit on recruiting conduct. Had the Tennessee Secondary School Athletic Association ("TSSAA") chosen to do so, it could have directly prohibited Brentwood Academy ("Brentwood") from engaging in *conduct* disfavored by TSSAA, as it has now done. TSSAA, however, did not prohibit the conduct but, instead, punished Brentwood for *speech* about that conduct. The issue, then, is whether TSSAA may punish Brentwood's speech simply because it facilitates conduct TSSAA dislikes but does not prohibit. Brentwood was punished for purely informational speech. TSSAA's punishment of that speech is a classic First Amendment violation. And, the process TSSAA used to punish Brentwood violated procedural due process.

Recognizing this, TSSAA asks the Court to excuse its unconstitutional actions by creating a new exception to the First Amendment and Due Process Clause. TSSAA claims this exception is warranted because Brentwood allegedly contracted away its speech and due process rights through its participation in TSSAA. This theory has no support in the Court's precedent or in the facts of this case. Brentwood was entitled to full protection under the Constitution, and the Sixth Circuit's holding that TSSAA violated Brentwood's First Amendment and due process rights should be affirmed.

**Overview.** In 1997, twelve boys agreed to attend high school that fall at Brentwood, a private parochial school with a nearly 100% rate of college attendance. They had "applied, been tested and admitted, and signed enrollment contracts with Brentwood." 304 F. Supp. 2d 981, 989 (M.D.

Tenn. 2003). Brentwood considered them to be enrolled at the school, although not yet matriculated.[1]

In April 1997, Brentwood's football coach Carlton Flatt sent a letter (JA 119)[2] "to all [twelve] incoming ninth grade male students," inviting them to attend spring football practice in May. 304 F. Supp. 2d at 989. The letter was followed by a telephone call to the parents of each student to reaffirm that participation in spring practice was entirely optional. Students who received the letters were entering high school and, therefore, had to change schools upon graduating from middle school One accepted student, who had not signed an enrollment contract, was not sent the "spring practice letter." *Id.*; 442 F.3d at 428.[3]

The boys receiving the spring practice letter ("SPL") were authorized under the rules of the relevant governmental regulatory body – TSSAA – to participate in spring practice, even though they had not yet matriculated. *Id.* at 419 n.2.

In 1997 Brentwood faced a unique situation. Ray Marley, a Grassland Middle School student, had been cleared by TSSAA to lift weights at Brentwood during 1996-97. Marley planned to matriculate at Brentwood in fall 1997 and wished to attend spring football practice. Flatt wanted to avoid any perception of favoritism for Marley, whose father was a coach and who was aware of the spring practice opportunity since he had been working out in the Brentwood weight room. 304 F. Supp. 2d at 997 n.14 (finding that "[TSSAA] told … Flatt to just get a letter … from the father

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[1] For discussion of this issue, *see* 442 F.3d at 418 n.1, 428, 429 n.13; JA 333 (Pitts); 339-40 (Haguewood).

[2] "JA" (joint appendix in this Court); "CAJA" (joint appendix in Sixth Circuit); "Pet. Br." (Petitioner's Brief in this Court); BIO (Brief in Opposition in this Court); Tr. (trial transcript).

[3] The communications "caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests;" they were "consistent with … TSSAA's legitimate governmental interests." 304 F. Supp. 2d at 995. "Neither students nor parents were exploited in theory or in fact." 442 F.3d at 428.

indicating his intent to send [Marley] to Brentwood … and it would be permissible."); *see* Appendix.

"[T]o avoid singling out any students, particularly Ray Marley," Flatt sent the SPL in April 1997 "to all incoming ninth grade male students." 304 F. Supp. 2d at 989. All students who got the SPL attended the practice. JA 278.

TSSAA's Executive Director, Ronnie Carter, had concerns about the number of students attending spring practice, believing that that opportunity had "outlived its purpose." CAJA 703. Faced with a situation of which he disapproved, but that the existing rules permitted, Carter punished the *speech* that resulted in the disapproved but legal outcome.[4] He said that Brentwood's speech was "undue influence" in violation of TSSAA's recruiting rule and punished Brentwood severely.[5] Application of the rule in this case was to "post-recruiting activity." The "parents and students who received the [SPL] and calls had already completed any 'recruiting' process." 304 F. Supp. 2d at 996.

The issue before the Court has nothing to do with the educational soundness of allowing incoming students to participate in spring sports practices. TSSAA had – and has now exercised (442 F.3d at 419 n.2) – the ability to ban such

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[4] The government has declined to enforce or defend a ban on speech about legal activity. *Magee v. United States*, 93 F. Supp. 2d 161 (D.R.I. 2000); *N. Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

[5] TSSAA imposed a four-year probation for Brentwood's athletic program, a two-year suspension of playoff eligibility for football and basketball and a $3,000 fine. JA 269-71. The rule guidelines provide "[v]iolation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school." JA 181. Initially, four of the twelve students were declared ineligible; three were black and the fourth was Native American. Despite the guideline, the eligibility of the remaining students (all white) was never questioned. JA 243, 444. Ultimately, no students lost eligibility. JA 270-71

practices. That is the appropriate resolution, not punishing speech about an activity allowed by TSSAA rules.

To deflect attention from the simplicity of the First Amendment case, TSSAA has erected a monolithic, undifferentiated strawperson – "athletic recruiting." But in the context of this "as applied" case, this abstraction is a non-issue. All agree that preventing exploitation of students justifies reasonable limits on recruiting. But Brentwood has not been punished for "offering an incentive or inducement to a student," JA 181, but for speech about an approved activity – speech that presented an opportunity, with twelve students attending an approved activity that eleven would not have known about but for the speech.

Throughout this litigation, Brentwood has supported a recruiting rule "that prevents inappropriate conduct" but that "allows the school to tell its story." JA 435. Government can limit *conduct* to prevent "harmful behavior" in ways it cannot limit *speech*. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). TSSAA refuses to make that distinction.

No TSSAA witness distinguished between speech and conduct. They simply condemned athletic recruiting in general. For example, Dr. Sharon Stoll did not understand the difference between speech and conduct: "I don't understand. Is there a difference between speech and conduct? ... I don't see a difference." JA 382-83; CAJA 1768. Dr. George Sage opined that "speech is [merely] a form of conduct." JA 411.

So, the real question is: whether, consistent with the First Amendment, an informational letter and a follow-up phone call to parents that were non-coercive, non-threatening and non-harassing can be "punished for disseminating information about an optional activity for incoming Brentwood students" under an "undue influence" standard by a "governmental entity exercising regulatory authority" when all students receiving the information "had applied,

been tested and admitted and signed enrollment contracts with Brentwood." 442 F.3d at 430, 421, 418.

Brentwood contends that the First Amendment protects this pure speech against punishment by a government regulator, regardless of the regulator's source of authority. *See* Section I.A.2, *infra* (discussing cases).

TSSAA takes a different position. It views negatively the fact that the boys receiving the SPL letters chose to attend the authorized practice. Pet. Br. 33 (SPL "caused 12 middle school students . . . to attend Brentwood's spring football practice"). This sequence of events – communication and consequence resulting from that communication – is what TSSAA objects to and punishes. But the First Amendment in its most basic essence protects this very sequence. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91(1978) (communication "may influence the outcome" of a decision; "this would be its purpose"); *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988).

If, as the lower courts have correctly held, the benign student-focused objectives of protecting children (i) against exploitation or (ii) against exalting athletics over academics are unsustainable here – even pretextual – and cannot be the basis of TSSAA's claim, what precisely is going on?[6]

The truly pernicious (and dangerous) claim that TSSAA makes – and one that it did not make until the 2001 appeal, 262 F.3d 543, 557[7]– is its claim that "competitive equity" justifies censorship of First-Amendment-protected pure non-commercial speech.[8] Both lower courts rejected this justification; so should this Court. Given that this Court

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[6] TSSAA's Bernard Childress stated that determining if the SPL actually harmed the students would serve no purpose. CAJA 1074; JA 467.

[7] Regulation of speech must serve "actual," not merely "stated" interests. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). TSSAA has not shown that "competitive equity" is an "actual" purpose. This Court "need not pursue that inquiry." *Republican Party v. White*, 536 U.S. 765, 778 (2002).

[8] This interest has no application here; the communications went only to students who had already signed enrollment contracts at Brentwood.

has rejected punishment of flag burning and cross burning[9] on First Amendment grounds, TSSAA's position "trivialize[s] the freedom protected in [earlier cases]." *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1308 (2006).

There is a fundamental difference between the "competitive equity" interest TSSAA now asserts and its other two interests. Competitive equity shifts the focus from the student's interest, which is the unit of analysis under the "exploitation" and "subordination" theories, to the collective interest of the schools, JA 409-10, thereby necessarily making the student's interest subservient to that of the association, and, to some degree, commodifying the students themselves. The competitive equity rationale places the student's educational interests in substantial tension with the association's regulatory interests. It treats students as objects, as "mere creature[s] of the state," which *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), condemns. This approach turns the role of government – facilitating educational opportunities – on its head, and disrespects the primacy of student/family choice.

Addressing that tension, the district court held that the "substantial government interest in informed choice trumps any government interest in controlling which schools or teams win athletic contests" because "[a]cademics are more important than athletics." 304 F. Supp. 2d at 994. Since TSSAA asserts an interest in subordinating athletics to academics, it is hard-pressed analytically to take issue with that holding. The Sixth Circuit agreed, holding that competitive equity is not a "substantial" governmental interest justifying a restraint on speech. 442 F.3d at 426-27.

Targeted non-threatening, non-coercive school-initiated communication with incoming students "may influence the outcome" of a student's decision to attend a particular school or activity. "[T]his would be its purpose."

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[9] *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning).

But TSSAA may not "restrict the speech of some [schools] in order to enhance the relative voice of others." That is "wholly foreign to the First Amendment." *Bellotti*, 435 U.S. at 790-91. "TSSAA cannot control school choice through censorship." 13 F. Supp. 2d 670, 689.

As applied to First-Amendment-protected speech, TSSAA's "competitive equity" interest boils down to this: if students and parents are made aware of educational opportunities through targeted non-threatening, non-coercive, non-harassing, school-initiated pure speech, competitive equity is threatened because the information might influence the students' educational choice. TSSAA's position does not require or even contemplate the existence of any conduct unprotected by the First Amendment or of a "pledge or promise of conduct."[10] The "undue influence" is the speech itself and its impact on the listeners, who might be influenced by its message.[11]

From this and from the standard that TSSAA proposes, what drives TSSAA's regulatory objective becomes clear – a sense that public schools have a form of proprietary interest in students zoned to them. TSSAA seeks to protect that proprietary interest by isolating students and their families from hearing about educational opportunities.

TSSAA Board of Control member Morris Rogers was not subtle in describing the "obvious" purpose of the recruiting rule – it is "really for protection of schools and coaches," by "[k]eep[ing] them from losing their best players." JA 368-69. The sense of community pride in winning a statewide athletic championship and its attendant protectionism are recurrent themes.

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[10] *See Republican Party*, 536 U.S. at 770 (distinguishing between speech and pledging or promising to engage in certain conduct).

[11] *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (an interest to keep people "ignorant in order to manipulate their choices in the marketplace ... is per se illegitimate").

Jack Roberts of Michigan's TSSAA counterpart stated that "[t]he sports events of our high schools are a source of pride;" communities can "develop[] a sense of ownership of these children" (considering them "our kids"), and "can develop resentment" if, "for academic or athletic reasons," students choose to attend an independent school, "[e]specially if they are really good athletes." JA 407-08. A local public school principal resented Brentwood because it had a "great coaching staff in football," and "good coaches... can attract higher quality athletes." CAJA 1821.

Scott Brunette, Nashville public schools athletic director testified that public school officials and coaches see students zoned to their schools as "our kids," and "complain about private schools ... beating us with our own kids" or "taking [our] students." JA 392; *see also* JA 349.

This protectionism – believing that a high school has a proprietary interest in students zoned to that school – is reinforced in TSSAA's broad "feeder pattern" exception to the recruiting rule. Contact otherwise prohibited by the recruiting rule is permitted within a feeder pattern (typically, middle schools students zoned to a particular high school). Brentwood's speech would not have been a "violation" if directed at students within a feeder pattern. JA 329-39; 389-92; 462-64; 477; 304 F. Supp. 2d at 995-96.

The district court found that, "[a]s applied in this case, there is no legitimate reason to permit speech in a feeder pattern but prohibit the same speech by Brentwood Academy to its incoming students." *Id.* at 995-96. That is, the "exploitation" and "subordination" interests are the same inside and outside the feeder pattern. Such under-inclusiveness calls into question the *bona fides* of the "exploitation" and "subordination" interests and reinforces the point that protectionism and isolation are in play here.[12]

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[12] *See Republican Party*, 536 U.S. at 780 (a "woefully under-inclusive" restriction in regard to a purported objective can "render belief in that purpose a challenge to the credulous"); *City of Ladue v. Gilleo*, 512 U.S.

In this regard, the First Amendment standard put forth by TSSAA is particularly and strikingly inappropriate. As stated by the Government: application of a rule is valid if "reasonable in light of [a government] program's purposes." Br. of U.S. 13. This is the First Amendment standard adopted in the context of *prisons*.[13] Its adoption here would transplant an existing body of doctrine designed for a specific, specialized, and very different context to a more general regulatory setting.

At bottom, then, TSSAA and its friends propose adoption of a First Amendment standard designed for the unique circumstances of the prison – a standard that "raise[s] grave First Amendment concerns outside the prison context" – for a regulatory setting involving education. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

This highlights a stark reality. TSSAA seeks an undemanding First Amendment regime that protects a school's proprietary interest in its zoned students and isolates students from truthful information that can influence their choice of educational options.[14] Dilution of First Amendment protection in the prison setting, where a "particular prisoner's lawful sentence" may take away "a right enjoyed by free persons,"[15] may be appropriate, but

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43, 52-53 (1994) (under-inclusiveness "diminishes the credibility of the government's rationale for restricting speech").

[13] A prison regulation that burdens speech is valid if "'reasonably related' to legitimate penological objectives" and not an "'exaggerated response' to those concerns." *Turner v. Safley*, 482 U.S. 78, 87 (1987).

[14] Government can *mandate* disclosure of truthful information to assure informed decisionmaking about important personal choices without imposing an undue burden on those choices. *See Planned Parenthood v. Casey*, 505 U.S. 833, 881-82 (1992) (upholding disclosure requirements for abortions). Since government can *mandate* such disclosures without creating an undue burden on important personal choices, it is hard to see how government can *prohibit* access to that very type of truthful information to prevent "undue influence" regarding educational choice.

[15] *Overton v. Bazzetta*, 539 U.S. 126, 139 (2003) (Thomas, J., concurring in judgment).

such a regime "raise[s] grave First Amendment concerns outside the prison context," as, unlike some other nations, ours is not a "prison-country."[16]

**The Recruiting Rule and Its Interpretation.** The recruiting rule[17] prohibits the "use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes." JA 181. The term "undue influence" is defined merely as "exceeding what is appropriate or normal." *Id.* The terms "appropriate or normal" are not defined. 13 F. Supp. 2d at 686. The rule applies to students and parents[18] and to both conduct and speech "that does not involve illegal inducements ..., threats, coercion, and harassment." CAJA 3514, 3539 (Req. No. 3).

A school is responsible for the use of "undue influence" (including speech) by persons "not connected" with the school and over whom the school has no control or even knowledge. This could apply to pure, informational communication about a school's virtues (or its athletic program) to a prospective student or parent by a local barber, a teacher, a religious counselor, or even, presumably, by a non-custodial divorced parent. TSSAA evaluates such

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[16] John Podhoretz, *Nightmare Come True: Love and Distrust in the East German Police State*, THE WEEKLY STANDARD, MARCH 12, 2007 at 37.

[17] TSSAA's regulatory jurisdiction stems from annual member school enrollments. Brentwood has routinely signed the obligatory form card, agreeing to "conduct its athletic programs ... in accordance with the rules and decisions of the TSSAA." JA 231.

[18] Michael Hammond, a TSSAA Board of Control member, stated that there is no difference whether parents or students receive the communication, "since parents probably are going to communicate to the child and they are going to get the information anyway... [s]o there is still an influence factor there." CAJA 1299; *see* JA 412, 415. Failure to distinguish between parents and children is problematic under the First Amendment. *See Lorillard Tobacco Co. v. Reilly*, 533 U. S. 525, 562-64 (2001).

allegations under an *ad hoc* "totality-of-the-circumstances" approach. JA 484.

The recruiting rule applies the "undue influence" standard to students "with or without an athletic record" and focuses on the use of "undue influence ... for athletic purposes." However, TSSAA enforces the "for athletic purposes" component without requiring intent as an element of an offense. 304 F. Supp. 2d at 992. TSSAA's Executive Director testified that "[j]ust about all of your violations are unintentional." JA 478. TSSAA concedes that Brentwood had no intent to violate the recruiting rule, JA 257-58, 271; the parties have stipulated that Flatt "had no intention of violating the Recruiting Rule by mailing the [SPL] and making the telephone calls." JA 275 (¶ 40). The district court noted that "Carter failed to explain how he could determine whether influence was 'for athletic purposes' without considering intent." 304 F. Supp. 2d at 992 n.5. The lack of an intent requirement chills speech in other areas. JA 436-41.

Considerable interpretive commentary follows the recruiting rule. JA 181-85. At summary judgment, it seemed that this commentary provided examples of *per se* violations of or safe harbors from the "undue influence" standard. 13 F. Supp. 2d at 686-87, *see also* Tr. 2113-23; JA 114-16, 182, 238-44, 269-71, 425-27, 475, 482-84.

The commentary's *per se* and safe harbor characteristics led the Sixth Circuit to conclude, at summary judgment in 2001, that the imprecision of the "recruiting rule by itself" was mitigated by the "authoritative instructions" of TSSAA, which offset the vague "undue influence" standard as applied to Brentwood. 262 F.3d at 556-57.

At trial, however, TSSAA disavowed this bright-line-rule interpretation of the commentary; analysis under the recruiting rule requires a standardless totality-of-the-circumstances approach. JA 412-13, 417. There are "not violations of questions" but only of the "undue influence"

standard; TSSAA "put[s] that all into the context of what has occurred," JA 429, to "determine whether all the factors that are there" constitute "undue influence." JA 428.

Carter distinguished his considerable discretion under the recruiting rule from his non-discretionary role in interpreting the eligibility-related age and eight-semester rules. JA 423-25, 431. For the recruiting rule, "the questions and answers [*i.e.*, the commentary] don't matter ..., it is not the rule." JA 483. The commentary is not binding. JA 366-67; 368, 465. In interpreting the recruiting rule, the rule itself "is all that really counts, everything else underneath it, the interpretive commentary is discretionary and it depends upon the totality-of-circumstances." JA 484.

The district court found that the "interpretive commentary to the Recruiting Rule is not a binding interpretation of the Recruiting Rule, and ... the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary," and they "have done so." 304 F. Supp. 2d at 986, 995 n.8.

The recruiting rule and the commentary have been modified a number of times since its adoption, when its focus was on the transfer of students from one school to another. JA 286-87. Carter was unable to identify a recruiting problem in Tennessee that "we need to fix." JA 480. During the 1984 revision process (JA 286-87), TSSAA did not consult or consider any outside authority, books, studies, or experts when adding the interpretive commentary. JA 480-82, 484-85. It looked at no empirical research "about the harms to students or their parents of athletic recruiting at the high school level." JA 485.

One final procedural point about the recruiting rule and its interpretation: TSSAA presented no evidence that it has considered either the impact of the recruiting rule on speech or non-speech alternatives. "[I]n the last ten years," TSSAA had not "ever considered alternatives to restricting speech in looking at the recruiting rule." JA 487-88.

Insistence on rigorous procedural safeguards is an important bulwark of the First Amendment. The First Amendment requires TSSAA to implement a "process," when the recruiting rule affects speech, that provides for "a careful calculation of the speech interests involved." Even when regulating other things, government must consider the regulation's impact on speech. *Lorillard*, 533 U.S. at 562. That did not occur and provides a procedural basis for affirming here. TSSAA cannot, as it must, "demonstrate a careful calculation of the speech interests involved." *Id.* TSSAA has never recognized that its regulation of speech is more limited than its regulation of conduct.

**The Content-Neutrality Issue.** At summary judgment, the district court rejected TSSAA's time, place or manner ("TPM") defense – that punishment was unrelated to the content of Brentwood's communications with students and parents, that the recruiting rule "is not an attempt to stifle speech, but is a valid time, place and manner restriction." 13 F. Supp. 2d at 687-88.

In 2001, on remand from this Court, TSSAA said its recruiting rule "must ... be viewed as a reasonable restriction on the time and manner" of Brentwood's "solicitation." The SPL was "recruiting conduct" proscribable "regardless of the specific content of the message" or its "persuasive effect." Its enforcement of the recruiting rule was "[s]tate regulation ... triggered by the event rather than the content of any speech during the event." BIO 12-13. The Sixth Circuit accepted TSSAA's TPM theory, noting that the rule was "regulatory action," that addressed "secondary effects" unrelated to the speech's content. 262 F.3d at 552-54, 558.

But, at trial, TSSAA disavowed a content-neutral interpretation of the recruiting rule and the interpretive commentary. TSSAA identified no content-neutral "secondary effects" toward which the regulation of speech was aimed. 304 F. Supp. 2d at 996 n.12. TSSAA acknowledged that it focused, case-by-case, on the content of

the speech and its impact on the recipients in determining whether Brentwood's speech constituted "undue influence." The district court found: "[T]he preponderance of the credible evidence at trial is that the substantive 'content' of the [SPL] and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule." In sum, "TSSAA penalized [Brentwood] for the substantive 'content' of the [SPL] and calls and the message conveyed." *Id.* at 992 n.4, 996 n.12 ("[A]pplication of the Recruiting Rule ... in this case is with reference to the content of the speech and [its] impact").

Since content-neutrality is a threshold requirement of a TPM defense, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 n.3 (2002), TSSAA cannot sustain its TPM defense.

**Non-Speech Alternatives.** TSSAA has rules not involving speech that are designed to foster competitive equity. These rules are not at issue in this proceeding.[19]

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[19] First, the recruiting rule itself may be applied to non-speech conduct without the risk of running afoul of the First Amendment – *e.g.*, prohibiting "offering an incentive or inducement to a student with or without an athletic record." JA 181. Second, for purposes of championship competition, public schools and Brentwood do not compete against each other; they are separated into different Divisions. JA 145-46. Third, Championship competition among schools within each Division is grouped based on the size of the student body of the school. Fourth, there are detailed restrictions on student transfers, including ineligibility for an entire year and forfeiture of games in which an ineligible student participates. JA 167-77, 191-92. In tension with the "subordination" principle, there is no exemption to the transfer rule "for bona fide academic purposes." JA 485. Fifth, "[n]o student shall be eligible to participate in any athletic contest... if he or she becomes 19 years of age on or before September 1." JA 161. Sixth, a "student shall be ineligible to compete in any sport if he or she attended a secondary school, or schools, for eight semesters." JA 158. Seventh, there are detailed restrictions related to a student's residence. JA 177-79. Eighth, financial aid is limited to non-athletic, need-based awards. JA 187-88.

**The TSSAA Procedures.** On July 29, 1997, Carter determined that Brentwood violated the recruiting rule and imposed immediate penalties. 304 F. Supp. 2d at 987.[20] Brentwood appealed, which was heard by Carter and three members of the Board of Control. "Brentwood Academy made a presentation at the appeal hearing, but the TSSAA presented no evidence." *Id.* On August 14, Carter "with the advice and consensus of the three members of the Board of Control, again found Brentwood Academy in violation . . . and imposed revised penalties." *Id.* Carter stated he was the decisionmaker, with the others being advisors, but the other Board members testified they were the decisionmakers. *Id.*

Brentwood appealed again to the entire nine-member Board of Control, which included the three who had participated in the prior appeal decision. Again, Brentwood "made a presentation to the Board of Control at a public hearing, and the TSSAA presented no evidence," *id.*, so Brentwood was unaware of the full nature and credibility of TSSAA's case. JA 394-403. After Brentwood put on its evidence, the Board of Control deliberated in a private "executive session" without Brentwood present. 304 F. Supp. 2d at 987. "[D]uring the private deliberations, Carter and the two TSSAA employees who had investigated the case answered questions from the Board of Control," while Brentwood "was excluded from the deliberations." On August 23, the Board of Control found that Brentwood had violated the recruiting rule and imposed new penalties. *Id.*

TSSAA investigators did not interview critical witnesses. JA 456-58, 474; CAJA 540, 1466-67. During the post-determination appeals, Brentwood had the burden of proving its innocence. JA 395. During the "executive session," when Brentwood was excluded, TSSAA staff and investigators presented their case, not subject to rebuttal or cross-examination. JA 467-68, 475-76, CAJA 770-771; 777-

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[20] The action letter also was sent to the local newspapers. JA 244.

787. The TSSAA investigators' notes (including Bart King) were discussed at the closed session but were not turned over to Brentwood. JA 393-403; 467-68; 475-76.

TSSAA's Board of Control "considered *ex parte*, post-hearing evidence" and, during its "private deliberations ... relied upon *ex parte* statements and documentary evidence from Defendant Carter and two TSSAA employees who investigated the allegations against Brentwood Academy," which had "no opportunity to reply to this *ex parte* evidence or even hear it and was prejudiced by the evidence and the private post-hearing process." 304 F. Supp. 2d at 1003. The Bart King allegations were discussed in the "executive session" and affected the "penalties imposed." *Id.* at 1004. TSSAA gave no indication that the King-related issues were still under consideration.

"Thus, the TSSAA and Carter misled Brentwood Academy about a person and allegation which ultimately mattered to the decision. Brentwood ... was denied an opportunity to defend this allegation head on." *Id.* at 1004 n.29. Applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), the district court found the TSSAA procedures violated procedural due process. *Id.* at 1003-06. The appeals were "post-deprivation hearings" for due process purposes, and, thus, the truncated "right of reply" procedures in a pre-deprivation context were insufficient. But even if pre-deprivation, due process is violated "if the plaintiff is not informed of the evidence considered by the decision-maker." 304 F. Supp. 2d at 1005; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985).

The Sixth Circuit affirmed, holding that, in its executive session, TSSAA discussed the allegations regarding King, that Brentwood "did not have notice that the King matter was a possible basis for final TSSAA action against Brentwood," and that the "King issue influenced the penalties." 442 F.3d at 434-36. The due process

requirements imposed by the Sixth Circuit are far from onerous or excessive and were derived from the *Mathews* balancing factors: "notice of the evidence relied upon in penalizing Brentwood and an opportunity to respond to that evidence before penalties were imposed." *Id.* at 438. Even alleged enemy combatants get such protection. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

## SUMMARY OF ARGUMENT

The Sixth Circuit's straightforward application of constitutional law to TSSAA's regulatory activity should be affirmed. TSSAA seeks a "dispensation" from these standards, but "[p]leas for special treatment are hard to sell," 531 U.S. 288, 305 (2001). TSSAA has not made its case.

1. TSSAA acted in a regulatory capacity in punishing Brentwood's pure speech. TSSAA's punishment of Brentwood's speech contains classic First Amendment violations. Its action is subject to traditional First Amendment protection of regulatory conduct, regardless of the source of its regulatory authority.

2. TSSAA has not overcome the presumption against waiver of constitutional rights and, procedurally, cannot even raise the waiver claim. TSSAA's contract/waiver analysis ignores the importance of the speech interests of parents and students, who are subject to TSSAA rules, but who are not TSSAA members and whose First Amendment interests are compromised.

3. TSSAA's punishment of Brentwood's pure speech is an unconstitutional penalty on Brentwood's exercise of First Amendment rights. The government spending and public employee cases do not apply to TSSAA's direct and specific abridgment of Brentwood's First Amendment rights. TSSAA cannot define away Brentwood's First Amendment or procedural due process rights.

4. To satisfy its burden here, TSSAA must show actual harm that government constitutionally may proscribe. In an as applied challenge to punishment of pure speech under an *ad hoc*, discretionary "undue influence" standard, the focus is on how the discretionary standard is applied to particular facts and circumstances. Otherwise, there cannot be effective judicial review. If, as TSSAA contends, the analytical focus remains only at a general level and without regard for specific application, then Brentwood should be allowed to reassert its facial challenge.

5. TSSAA violated Brentwood's procedural due process rights by considering *ex parte* post-hearing evidence that Brentwood did not know was still relevant and to which it had no opportunity to reply. The *ex parte* evidence included investigative notes by TSSAA officials that were not given to Brentwood. TSSAA never had to establish its case or carry a burden of justification for punishing speech; the burden of justification at all times lay with Brentwood.

## ARGUMENT

**In General.** When government restricts or punishes pure speech, as in this case, it bears a "heavy burden" of justification. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952). A "citizen is entitled to seek out or reject ... influences without Government interference or control." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). This principle applies to all non-commercial speech, including films (*Burstyn*) and adult entertainment (*Playboy*), not just matters of public concern. A state may not dictate "the subjects about which persons may speak." *Bellotti*, 435 U.S. at 785.

"Government may not ... restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995). This foundational principle has been upheld against extremely

important governmental policy objectives.[21] Yet, TSSAA wants a special dispensation for football "equity."

The First Amendment also protects the rights of potential listeners to hear what others have to say. "It is now well established that the Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), *cf. Thomas v. Collins*, 323 U.S. 516, 534 (1945) (requiring organizers to register before soliciting union membership violates both the labor organizer's right to speak and the rights of workers "to hear what he had to say"). The right to receive information is "nowhere more vital" than in the nation's schools and universities. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

First Amendment doctrine distinguishes between content-based and content-neutral forms of government regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994). *Content-neutral* laws – such as TPM restrictions – are subject to intermediate scrutiny. *See Thomas*, 534 U.S. at 323 & n.3.

*Content-based* restrictions are "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). "[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). And a Court "cannot be influenced ... by the perception that the regulation in question is not a major one because the speech is not very important," as "all content-based restrictions on speech" warrant exacting scrutiny. *Playboy*, 529 U.S. at 826.

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[21] *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (allowing publication of juvenile offender's name); *Landmark Commc'n, Inc. v. Virginia*, 435 U.S. 829 (1978) (upholding publication of information about confidential commission proceedings); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (allowing publication of rape victim's name); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109 (1990) (state has a "heavy burden" of justifying punishment of "dissemination of accurate factual information").

The strong presumption against content-based regulation of expression extends to prohibition of "discussion of an entire topic," *Consol. Edison Co. v. PSC*, 447 U.S. 530, 537 (1980), as government cannot choose "which issues are worth discussing or debating." *Mosley*, 408 U.S. at 96; *accord Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980). Government's power to impose content-based limitations on expression "surely does not vary with the identity of the speaker." *Simon & Schuster, Inc. v. N. Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 765, 134 (1992).

To justify a content-based regulation, government must show "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Simon & Schuster*, 502 U.S. at 118. The burden rests with the government, *Playboy*, 529 U.S. at 816, 818, and rigorous judicial scrutiny both of the importance of the objectives pursued and of the means/ends relationship applies.

So, the baseline for First Amendment speech issues requires the government regulator to justify its restriction of pure speech under a form of heightened scrutiny – *i.e.*, intermediate scrutiny under TPM analysis, or strict scrutiny if the regulation is content-based. This is well-established and straightforward. The initial debate below centered on whether TSSAA's punishment of Brentwood's speech was content-based. Regardless, TSSAA has been unable to meet its burden. In fact, TSSAA placed the burden on Brentwood. JA 395, 401, 467-68; CAJA 1485-1486.

**The TPM Defense.** TSSAA cannot sustain its TPM defense. At summary judgment, the district court rejected TSSAA's TPM defense. 13 F. Supp. 2d at 687-91. On appeal in 2001, the Sixth Circuit believed that enforcement

of the recruiting rule, while regulatory action, was not content-based since it regulated "secondary effects." The court remanded for trial on the "as applied" claim, allowing TSSAA to establish a TPM defense. 262 F.3d at 553-58.

TSSAA did not meet this burden. The district court held that, as applied, the recruiting rule was not narrowly tailored to achieve either the exploitation (no harm or threat of harm was shown) or the subordination (no singling out of athletes was shown) interest; the competitive equity interest was not "substantial" enough to justify censorship of speech. 304 F. Supp. 2d at 994-97. The Sixth Circuit affirmed. 442 F.3d at 425-31.

At trial, TSSAA conceded that the basis for its regulatory enforcement action against Brentwood was the impact of the communication on the students and their parents. The district court found that application of the recruiting rule was not "tailored to control any 'secondary effects,'" but was directed at the "content of the speech and the impact of the speech." 304 F. Supp. 2d at 996 n.12. Thus, contrary to the summary judgment record, the trial record established that TSSAA "penalized Brentwood ... for the substantive 'content' of the [SPL] and calls and the message they conveyed in this case." *Id.* at 992 n.4. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 134.

These unchallenged factual findings insure that TSSAA cannot establish its TPM defense. Since content-neutrality is a prerequisite to a successful TPM defense, the lack of content-neutrality negates TSSAA's TPM theory.[22]

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[22] The TPM defense also fails because of TSSAA's excessive discretion. "[A]dequate standards" must exist to guide decisions and "render [them] subject to effective judicial review." *Thomas*, 534 U.S. at 323.

## I. Heightened Scrutiny Applies To TSSAA's Use Of The Recruiting Rule On Pure Speech.

TSSAA's regulatory conduct directed at Brentwood is subject to conventional First Amendment scrutiny of regulatory conduct by the state. *See* BIO at 17.

### A. TSSAA Is A State Regulator.

**1. The State Action Holding.**[23] TSSAA exists "to stimulate and *regulate* the athletic relations of the secondary schools in Tennessee." JA 134 (emphasis added). It was "organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it." 531 U.S. at 291. This Court addressed the following issue in 2001: "[W]hether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school," a "private parochial high school." *Id.* at 290, 293. The Court's answer: "[T]he association's regulatory activity ... should be treated as state action." *Id.* at 291. It was for this regulatory function, exercised "in lieu of the State Board of Education's exercise of its own authority," *id.*, and as a "surrogate association" for the state board, *id.* at 300, that TSSAA was a state actor. TSSAA had been designated and recognized as the state's "regulator" of interscholastic athletics. *Id.* at 292-93.

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[23] Although TSSAA addresses the issue cursorily, the state action issue decided in 2001 is not in the Questions Presented, and, thus, is not properly before the Court. Even if it were, there would be no basis to revisit the Court's 2001 decision, which it described as being "nowhere near the margin," and as merely bringing an "outlying circuit" into "harmony" with "precedent otherwise uniform." 531 U.S. 288, 294 n.1, 304-05 (2001). Finally, Brentwood has addressed the propriety of reviewing this issue. *See* BIO 28-29. To be considered, the issue should be set for reargument.

This Court saw TSSAA's enforcement of the recruiting rule as regulatory conduct. It noted that this case "responds to a 1997 regulatory enforcement proceeding brought against ... Brentwood, a private parochial high school member of [TSSAA]." *Id.* at 293. TSSAA is restricting Brentwood's speech "as a government regulator," 442 F.3d at 423, and its regulatory conduct affects the First Amendment interests of students and parents, blocking them from receiving information that could influence their educational decisionmaking. In this case, the absence of information would have foreclosed participation in an approved school activity. As the Sixth Circuit noted, "TSSAA, in administering its rules and regulations and imposing penalties against member schools, acts as a regulator, not as an employer, contractor, or disburser of funds." *Id.* at 424.

**2. The Source of Government Authority Does Not Determine TSSAA's Regulatory Capacity.** According to TSSAA, conventional First Amendment analysis applies only to a state's exercise of sovereign police power over an unwilling citizen. TSSAA asserts that the *source* of government's authority (contract or sovereign) is controlling. This Court's decisions, however, mandate that conventional First Amendment principles apply to TSSAA's regulation of Brentwood's pure speech.[24] 442 F.3d at 422-24.

The critical First Amendment issue is the power of government officials to restrain speech, whether through exercise of sovereign or contractual authority. To qualify as "regulation," governmental suppression of speech need not stem from sovereign status. It can come from activities amounting to "informal censorship." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 n.9 (1963). Regulation can involve

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[24] TSSAA's position could lead to questionable and anomalous consequences. A restriction on speech adopted by a state university would receive toothless First Amendment protection, yet the same code adopted legislatively would receive exacting scrutiny.

sovereign authority, but it need not, as when government engages in certification or accreditation functions rather than licensure. Even in the licensure context, regulators may impose sanctions (*e.g.*, reprimands or censures) that do not involve exercises in sovereign power (*i.e.*, do not invoke the power of the state to prohibit conduct).

In *Bantam Books*, a state commission had authority "to educate the public concerning any book" tending to "corrupt[] ...youth," not prosecutorial authority. *Id.* at 59, 61-62. Despite the commission's lack of prosecutorial (sovereign) power, this Court analyzed the commission's impact on speech under conventional First Amendment doctrine. This Court has done the same in other non-sovereign settings, such as in public schools and state universities, which exercise contract power over students.

At the same time, this Court has narrowly circumscribed speech protections when government exercises sovereign power, as in the prison context. This Court has recognized that the constitutional rights of prisoners "are more limited in scope than the constitutional rights held by individuals in society at large," and has adopted a "deferential standard for reviewing prisoners' constitutional claims." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). An "inmate does not retain rights inconsistent with proper incarceration," *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), since a sentence may "validly deprive[] the prisoner of a constitutional right enjoyed by ordinary, law-abiding, persons." *Id.* at 140 (Thomas, J., concurring in judgment).

Thus, the *source* of government's authority to punish speech is not determinative. As in the prison context, deference is called for in some situations in which government exercises sovereign power; in other cases (such as *Bantam Books*), exacting scrutiny is applied where government is not exercising sovereign power. No bright-line rule of deference exists with regard to the *source* of

government's regulatory authority. Instead, this Court has looked at the government function performed in restricting or punishing speech, the nature and importance of government's interests, and the impact of the suppression of speech on speakers, listeners and recipients of the speech.

In *Bantam Books*, this Court noted the importance of procedures to protect speech against curtailment and the absence of such procedures surrounding the commission. The commission argued that conventional First Amendment principles did not apply because it did "not regulate or suppress" speech but "simply exhorts" and advises booksellers. 372 U.S. at 66. That contention was "premised on the Commission's want of power to apply formal legal sanctions." That is, the commission asserted that it was not exercising sovereign power to suppress speech.

That the commission exercised no formal sovereign functions was immaterial. This Court found that the commission's conduct, a form of blacklisting, was designed and served to stop the circulation of publications. The commission's conduct was "a form of regulation that creates hazards to protected freedoms." The procedures fell "far short of the constitutional requirements of governmental regulation." *Bantam Books*, 372 U.S. at 70, 71.

Similarly, in *Conrad*, 420 U.S. 546 (1975), this Court applied conventional regulatory doctrine to proprietary operation of a municipal theatre. The existence of excessive discretion by public officials in contracting triggered the same procedural requirements as in sovereignty-based licensing. *Id.* at 554 & n.7. *Conrad* applied First Amendment principles from the licensing cases to the city's decision not to contract with "Hair" in the municipally-run theatre. The city's decision not to contract was "indistinguishable in its censoring effect from the official actions" in the licensing cases. *Id.* at 552. "[R]estraints" on speech take a "variety of forms." *Id.* at 553.

The contract was "in effect, a license or permit" with approval based on the "exercise of judgment." *Id.* at 554 & n.7. *Conrad* accordingly applied conventional First Amendment "prior restraint" doctrine, although derived from cases involving restraints "embedded in the licensing system itself." *Id.* at 553. The contractual form and its non-sovereign source did not save the restraint from being considered a "prior restraint" on speech subject to First Amendment principles applicable to sovereignty-based licensing cases, *id.* at 555; the "elements of prior restraint identified in [the licensing cases] were clearly present in the system by which the Chattanooga board regulated the use of its theatres." *Id.* at 554; *accord Forsyth County*, 505 U.S. at 131; *Thomas*, 534 U.S. at 321; 442 F.3d at 423-24.

*Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136 (1994), also demonstrates the baselessness of TSSAA's asserted doctrinal principle. Ibanez practiced law and also was a certified public accountant (CPA). With one exception, accounting "activities performed by CPA's can lawfully be performed by [unlicensed] non-CPA's." *Id.* at 139 n.3.[25]

Ibanez voluntarily subjected herself to the Board of Accountancy, which censured her for using CPA and CFP (certified financial planner) designations. Since Ibanez did not need Board approval to practice law or accounting, the Board had no sovereign authority over her. It exercised a credentialing or certification function, but had no authority to require Ibanez to stop practicing accounting – only to stop using certain designations.

Although the Board exercised non-sovereign certification authority and imposed censure (a non-sovereign

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[25] Florida's "Title Act" requires no license to perform accounting functions except auditing. Accountants may seek the "title" of CPA as an imprimatur of a governmental entity and voluntarily subject themselves to the board's regulatory authority. *Ibanez*, 512 U.S. at 139 n.3.

penalty), this Court applied traditional commercial speech doctrine from the licensing cases. Ibanez voluntarily submitted to the Board's regulatory jurisdiction to receive its imprimatur; Brentwood voluntarily submits to TSSAA's regulatory authority to participate effectively in organized interscholastic athletics. Just as the full panoply of commercial speech protections applied in *Ibanez* to a disciplinary proceeding in the non-sovereign regulatory context, so does the full panoply of non-commercial speech protections apply to TSSAA's regulatory disciplinary proceeding against Brentwood.

In *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the state board of education asserted "power to condition access to public education on [saluting the flag]." *Id.* at 630. The board regulated public schools (non-sovereign power) and private schools (sovereign power). *Id.* at 626 n.1. By resolution, the board imposed a compulsory flag salute, which applied only in *public* schools, *id.* at n.2, and was implemented as a "condition [of] access to public education." *Id.* at 630. Even though "[p]arents have the privilege of choosing which schools they wish their children to attend" so that attendance at public school was voluntary, *id.* at 657 (Frankfurter, J., dissenting), this Court applied the "grave and immediate danger" First Amendment standard applied in criminal cases. *Id.* at 639-42.

In *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000), the question was whether a public university may require its students to pay an activity fee that supports extracurricular speech. This Court held that objecting students were entitled to certain First Amendment "safeguards with respect to the expressive activities which they are required to support." *Id.* at 229. Students voluntarily (contractually) enroll in a public university. Nevertheless, the Court applied conventional First Amendment principles to assure that a standardless referendum procedure did not undermine traditional First

Amendment protections – that funding for a student organization's speech "not depend upon majoritarian consent." This was a contractual setting, yet, traditional First Amendment principles were "controlling." *Id.* at 235.[26]

In *Keller v. State Bar*, 496 U.S. 1 (1990), state law compelled lawyers to join and pay dues to an integrated bar. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), a collective bargaining contract mandated payment of union dues by public employees. This Court upheld both mandatory payments but held the bar and union could only spend mandated dues on matters germane to regulation of the legal profession and collective bargaining, respectively. Contributions compelled by government for *political* purposes infringe First Amendment rights, whether compulsion derives from positive law (*Keller*) or contract (*Abood*). The First Amendment principles are identical.[27]

In sum, there is no basis for TSSAA's claim that the *source* of government's authority controls First Amendment analysis. Government can act as a regulator in a variety of different contexts. "[R]estraints" on speech take a "variety of forms" subject to conventional First Amendment review. *Conrad,* 420 U.S. at 553. And traditional First Amendment protections attach even to speech that government may view as "not very important." *Playboy*, 529 U.S. at 826. Private speakers get to choose their topic; government regulation of a speaker's topic is subject to strict scrutiny. *Bellotti*, 435 U.S. at 785 (government may not dictate "the subjects about which persons may speak"). The "contract" thesis is a feint.

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[26] *See also Widmar v. Vincent*, 454 U.S. 263, 264-65 n.3, 270, 276 (1981); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-35 (1995); BIO 20-21.

[27] *See* BIO 22; *cf. Tool Box v. Ogden City Corp.*, 355 F.3d 1236 (10th Cir. 2004) (*en banc*) (city used "protective covenants" (contractual power) to prohibit First-Amendment-protected nude dancing; court analyzed covenants (contract power) as regulatory zoning (sovereign power)).

### B. TSSAA Violated Basic First Amendment Doctrine.

TSSAA's enforcement action involved violations that basic First Amendment doctrine is designed to guard against. The seven violations described in this section demonstrate why traditional First Amendment protections do and should apply to TSSAA's punishment of Brentwood's pure speech and why the special dispensation from First Amendment doctrine sought by TSSAA for its regulation of high school athletics should be rejected.

First, speech and conduct must be distinguished, which TSSAA has not done. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds"). TSSAA punished speech about a permissible activity, a core First Amendment violation. *See* note 4, *supra*. The harms TSSAA focuses on largely stem from attendance at the approved practice itself. *See* Pet. Br. at 8-9 & n.2. Non-speech regulatory alternatives exist, including a ban on attending spring football practice by incoming students, which has been implemented. 442 F.3d at 419 n.2; *see* note 19, *supra*. If the Government could achieve its interests in a manner that does not restrict speech, or that restricts speech less, the Government must do so. [R]egulating speech must be a last – not first – resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). But speech restriction is the only resort TSSAA has visited.[28]

Second, "[i]nsistence on rigorous procedural safeguards" is an important First Amendment "bulwark[]." *Conrad*, 420 U.S. at 561. Since the recruiting rule impinges on speech, the First Amendment requires TSSAA to implement a "process" that provides for "a careful

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[28] Faced with a "plausible, less restrictive alternative," government must prove the alternative "to be ineffective," *Playboy*, 529 U.S. at 823, which TSSAA has not done. JA 487-88.

calculation of the speech interests involved." Even when regulating other things, government must consider the impact of the regulation on speech. *Lorillard*, 533 U.S. at 562. That did not occur and provides a procedural basis for affirming. TSSAA cannot, as it must, "demonstrate a careful calculation of the speech interests involved." *Id.* TSSAA's regulation of speech is much more limited than its regulation of conduct. "TSSAA needs to go back to the drawing board and start over." 13 F. Supp. 2d at 690.[29]

Third, TSSAA burdens more speech than necessary. The means used to regulate speech must not "burden substantially more speech than is necessary to further the government's legitimate interests." The recruiting rule's sweeping coverage and application mean that a "substantial portion of the burden on speech does not serve" TSSAA's goals. *Ward v. Rock Against Racism*, 491 U.S. at 781, 799 (1989); 13 F. Supp. 2d at 688 n.14.

Fourth, TSSAA's approach to speech promotes self-censorship and a chilling effect on protected expression. The recruiting rule bars undue influence "for athletic purposes," but there can be a violation "without an 'intent' to violate." 304 F. Supp. 2d at 992. The risk of discipline for an unintentional violation has precisely the kind of self-censoring, chilling effect that the First Amendment guards against. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).[30] Brentwood is inhibited from

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[29] The template embraced in *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), in which the Court deferred the broader issues, could well be adopted here. A straightforward way to affirm exists because TSSAA violated the First Amendment by (i) failing to recognize that its authority is more circumscribed when regulating speech than conduct; and (ii) as a consequence, abdicated its duty to "demonstrate" that it had engaged in a First-Amendment-required "process" of undertaking "a careful calculation of the speech interests involved." *Lorillard*, 533 U.S. at 562.

[30] The mixed-skill case illustrates the potential for abuse and for self-censorship. JA 340. Does the "athletic purpose" concept, which does not require intent, apply when a school contacts a gifted student with

proactively pursuing interests in diversity, JA 439-44 (Masters), and families are inhibited from receiving targeted information from schools, thereby adversely affecting their interest in acquiring information about schools or, after signing an enrollment contract, program activities.[31]

Fifth, there is excessive discretion in the administration of the recruiting rule. *Forsyth County*, 505 U.S. at 133 & n.10. The interpretive commentary is not binding, and the "undue influence" standard is interpreted under an amorphous, "totality-of-circumstances" standard. JA 484. That is, "the recruiting rule by itself" governs, and does not constrain TSSAA's discretion. 304 F. Supp. 2d at 986, 992, 995 & n.8; 442 F.3d at 428. These factual findings are amply supported in the record.[32]

The repeated assertion that schools should "[p]ick up the telephone and call" Carter, if in doubt about an interpretation of whether particular speech is "undue influence," is far from acceptable. JA 432, 421-24. This makes Carter a "'licenser' – an administrative official who enjoy[s] unconfined authority to pass judgment on the content of speech," a "core abuse" against which the First Amendment is directed. *Thomas*, 534 U.S. at 320. As the district court noted, that "TSSAA allows members to seek advice about how the Recruiting Rule will be interpreted does not eliminate the discretion that it retains to apply the subjective terms in an arbitrary fashion." 13 F. Supp. 2d at

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many talents who, unbeknownst to the school, is also a gifted athlete? CAJA 1505-07 (describing effort to attract student to Roxbury Latin School whom Obel-Omia saw performing *A Raisin In The Sun*, and who "turned out to be not only a wonderful actor … but [also] a championship wrestler" who later wrestled at Harvard). To be safe, a school must either self-censor or prophylactically refuse to allow such a student to participate in sports, a punitive policy that, in fact, singles out athletes.

[31] There is a need for proactive targeted communication to attract lower-socioeconomic-level students. JA 305-07, 310-11; 354-57; 359-60.

[32] *See* JA 366-67; 421-23, 482-84; Tr. 1052-53.

693 n.26. Such "unbridled discretion" violates the First Amendment. *Forsyth County*, 505 U.S. at 133 & n.10.[33]

Sixth, TSSAA must establish the "actual" not just "stated" interest in support of its regulation of speech. That burden is not satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at 768, 770. "[H]ypothesized justifications" are insufficient. *Thompson*, 535 U.S. at 374.

In its deliberative process, government must have and "rely upon" some basis of evidence to support its speech-restricting regulation. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438, 442 (2002) (Government cannot "get away with shoddy data or reasoning .... [E]vidence must fairly support the ... rationale for [regulation]"). TSSAA did not establish what "actual"[34] interests underlie its "undue influence" standard, JA 479-80, and cannot support any of its asserted interests, as applied, other than by "conjecture." In adopting and retaining the recruiting rule, TSSAA did not rely on studies it performed or that others performed.[35] JA 480-85. In contrast, Brentwood has "cast direct doubt" on TSSAA's factual claims. *Alameda Books*, 535 U.S. at 438.

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[33] A "regulatory program aimed at the prevention of undue influence" risks the "danger of censorship through selective enforcement of broad prohibitions." *In re Primus*, 436 U.S. 412, 432 (1978). The First Amendment requires adequate standards for "effective judicial review." *Thomas*, 534 U.S. at 323.

[34] This is particularly true for the "competitive equity" interest, which TSSAA did not raise until the 2001 appeal. 262 F.3d at 557. The "feeder pattern" exceptions further undermine TSSAA's rationale for restricting Brentwood's speech. *See* note 12, *supra*. That under-inclusiveness calls into question whether TSSAA's asserted interests are "actual" or substantial. *City of Ladue*, 512 U.S. at 52-53.

[35] Carter was "not aware of any ... empirical research about the harms to students or their parents of athletic recruiting at the high school level." JA 485; *see also* JA 480; 13 F. Supp. 2d at 689 n.16. Concerning the subordination interest, TSSAA at first said it relied on the same evidence as its experts, but at trial admitted to the contrary and did no study of its own. CAJA 3539-40, 3535; 996-1007; JA 484-85.

Seventh, content-based restrictions are not "permissible [simply] because other avenues of expression remain open." *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (government cannot "ban leaflets" because persons "are free to publish books").

## II. TSSAA Merits No Special Dispensation From Traditional First Amendment Doctrine.

What TSSAA seeks in the First Amendment context is "nothing less than a dispensation for itself," a "[p]lea[] for special treatment" for the regulation of high school athletics. 531 U.S. at 304-05. It seeks to avoid the distinction between its power to regulate *speech* and *conduct*, and proposes a drastically watered down version of First Amendment protection, akin to the protection applicable in the prison context. TSSAA seeks to expand certain accommodations this Court has made – in the context of public expenditures and public employment – by transforming them into general doctrine. This Court should reject TSSAA's plea.

### A. TSSAA's Waiver Analysis Is Flawed.

At bottom, TSSAA's contract theory claims that, by signing a registration form, Brentwood has waived something. To avoid its First Amendment obligation, TSSAA relies on a one-line statement in the form: Brentwood agreed to "conduct its athletic programs for the year 1997 in accordance with the rules and decisions of the TSSAA." JA 231.

Constitutional rights can be waived, but the waiver claim here fails for both technical and doctrinal reasons.

Waiver is an affirmative defense that, along with other such defenses as "estoppel," is itself waived if not pled. Fed. R. Civ. P. 8(c). In its Answer to Brentwood's complaint, CAJA 86 (Fourth Defense), TSSAA did not plead the affirmative defense of "waiver" and cannot assert it now.

But, even if TSSAA could assert a waiver defense, it cannot prevail. To be effective, a waiver must be "voluntary, knowing, and intelligently made," an "intentional relinquishment or abandonment of a known right or privilege." This Court does not "presume acquiescence in the loss of fundamental rights." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Thus, "in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'" *Fuentes v. Shevin*, 407 U.S. 67, 95 n.31 (1972).

The starting point is the "content of the contract." A waiver must "at the very least be clear." Issues such as "involuntariness or unintelligence" do not enter the analysis "when the contractual language relied upon does not, on its face, even amount to a waiver." *Fuentes*, 407 U.S. at 95.

Brentwood agreed to abide by TSSAA's rules. As TSSAA notes, it would have no authority over Brentwood if the school did not agree to be bound by the TSSAA's rules and regulations. This agreement did no more than what TSSAA has claimed for it – it subjects Brentwood to TSSAA authority, but it does not constitute a waiver of rights. The TSSAA-drafted form contract "gives no guidance as to whether Brentwood waived a right to challenge a rule it considered unconstitutional." In the face of the presumption against waiver, the "contract's silence thus becomes evidence of an absence of waiver of constitutional rights," especially since there is "no basis for differentiating between a waiver of some rights and not others." 442 F.3d at 425. In short, nothing on the "face" of the contract "even amount[s] to a waiver." In the absence of any specific language in the contract regarding waiver of rights, TSSAA cannot meet its burden of overcoming the presumption against waiver.

In addition, there must be specificity of just what rights are being waived. In *Fuentes*, this Court refused to find waiver in a contract that allowed a seller to "take back" or "repossess" merchandise upon default, but that did not

specify waiver of any particulars, such as a hearing. Unlike the waiver in *Snepp v. United States*, 444 U.S. 507 (1980), which specified exactly what procedures would be followed if a former CIA employee sought to publish a book, the contract in *Fuentes* did not indicate "*how* or *through what process* ... the seller could take back the goods." 407 U.S. at 96 (emphasis added). The TSSAA form here says nothing about waiver or what is being waived. JA 231.

Also, waiver requires the "intentional relinquishment" of a "known" right or privilege. *Overmyer*, 405 U.S. at 186. According to TSSAA and the Sixth Circuit, TSSAA was not a state actor in 1997 under circuit precedent. Under the circumstances, it seems quite far-fetched to assert that in 1997 Brentwood "intentional[ly] relinquish[ed]" a "known" constitutional right. Absent state actor status, TSSAA is not subject to the First Amendment or due process, so Brentwood could not (under TSSAA's own theory) have "intentional[ly] relinquish[ed]" a "known" constitutional right since no such constitutional right existed.

So, on technical and doctrinal grounds, TSSAA cannot overcome the presumption against waiver.[36] There are additional, important reasons not to depart from strict waiver standards in this case.

TSSAA's waiver (and contract) arguments do not account for the First Amendment interests of students and parents, focusing only on the source of governmental regulatory power and the relationship between TSSAA and Brentwood. Robust First Amendment waiver protections are

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[36] Waiver can be appropriate, as *Snepp* shows. But the facts of *Snepp* are much different. Snepp's "trust" relationship with the CIA gave government a "compelling interest" in protecting the "secrecy of information important to our national security." 444 U.S. at 510-11 & n.3. TSSAA does not have a "trust" relationship with its members, and its punishment of speech here is not necessary to promote any interest.

critical for these third-party interests,[37] especially as students also are subject to TSSAA penalties. *See* note 5, *supra*.

**B. TSSAA Penalized The Exercise of Basic Rights.**

TSSAA's punishment of Brentwood for its pure speech stems from concern that the recipients of the speech will act on it. This is a "direct and specific abridgment of First Amendment rights." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996). Whether viewed under First Amendment analysis or unconstitutional conditions analysis, TSSAA's action fails.

Under the unconstitutional conditions doctrine, "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). It was developed as a shield – to overcome the proposition, "rejected for decades now," that a "public employee has no right to a government job and so cannot complain that termination violates First Amendment rights." *O'Hare*, 518 U.S. at 715-16. TSSAA would turn the unconstitutional conditions doctrine from a shield that gives greater protection to constitutional claims into a sword aimed at the heart of First Amendment doctrine.

This Court has recognized that if the government "could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Id.* at 716. When government directly punishes protected First Amendment

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[37] *Bellotti* (an "undue influence" case) is instructive. This Court stressed the "inherent worth" of speech, which "does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777.

activity, thereby penalizing it, the level of scrutiny is the same whether the right is being directly infringed or whether consequences flow from the exercise of that right.[38]

This Court has recognized government's special commonsense interests when it spends money on specific programs. If government wishes to support a program for one issue, it must be able to guard against the recipient spending the funds on something else even though this distinction is essentially content-based. Similarly, if government wishes to dissociate itself from fund recipients who discriminate on the basis of race or gender, it may do so. These funding cases are a special circumstance, and, in upholding restrictions on speech funded by government, the Court has made it clear that the entity receiving the funds does not surrender its constitutional rights at all.

Thus, this Court has long held that a "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980). But direct state interference (as here) with a protected activity is different from a funding decision to prioritize or to disfavor a protected right. *Maher v. Roe*, 432 U.S. 464, 475 (1977).

*Rust v. Sullivan*, 500 U.S. 173 (1991), broke no new ground in this regard. Contrary to TSSAA's claim, *Rust* does not authorize the conditioning of a benefit upon the surrender of constitutional rights. In fact, *Rust* does no more than allow government to get what it pays for while also dissociating itself from certain disfavored private activity (as

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[38] *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (When significant "penalties" are imposed "for the exercise of rights guaranteed by the First Amendment," such penalties "impermissibly encroach on First Amendment freedoms"); *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (Interests affected by durational residency requirements for voting are "affected in different ways.... The right to travel is merely penalized, while the right to vote is absolutely denied. But these differences are irrelevant ... [since] a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution").

it does in Title VI and Title IX of the Civil Rights Act). *See Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984).

In *Rust*, government funded family planning services but barred use of those funds for abortion-related services, including abortion-related speech. 500 U.S. at 196. The regulations were upheld, precisely because they did not exact a surrender of speech rights in exchange for federal funding. Government was not acting as regulator via its spending power; it did not seek to control collateral or downstream activity by recipients, so that government would be projecting its spending power in a regulatory manner.[39] On the contrary, the regulations only required that government-funded projects operate within program guidelines; grantees could seek other funding for non-guideline activities, provided that such projects were separate and distinct. By accepting federal grant funds, grantees did not surrender their constitutional rights to discuss abortion; their speech was restricted only in their use of federal grant funds, leaving a grantee "unfettered in its other activities." *Id.*

Thus, in *Rust,* government was "simply insisting that public funds be spent for the purposes for which they were authorized" and not something else. Grantees could still engage in abortion-related speech, but those activities had to be "separate and independent from the project that receives [federal] funds." *Id.* In this way, government did not impose conditions on its grants, it merely chose to fund certain programs and not other, disfavored activities, which could continue provided the government's desire to be disassociated from that activity was honored.

The essential point here is that the rules controlling government spending are different from the rules controlling other forms of government activity, such as regulation. And when government spending equates with regulation – *e.g.*,

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[39] *Cf. South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (government can regulate by contracting, thereby losing its dormant commerce clause exemption for market participation).

projecting its objectives beyond the scope of the grant – then this Court has viewed the exercise of governmental power in a different light. *Id.* at 199-201. *Rust* holds that, in choosing which programs to fund, government can dissociate itself from disfavored activities (even if it cannot directly punish that activity in other ways).[40] *Rust* does not support the direct punishment of speech by TSSAA in the regulatory (not funding) context of this case. *See Ibanez, supra.*

### C. The Public Employee Doctrine Does Not Authorize TSSAA's Regulatory Conduct.

Relying on public employees cases, TSSAA asserts that Brentwood's pure speech is not protected because it does not involve a matter of public concern. "[W]hen the government regulates how and when citizens can enter into voluntary contractual relationships with the government that regulate certain speech by those citizens, the government's licensing or regulatory scheme must meet constitutional standards, regardless of whether the speech at issue involves a matter of public concern." 442 F.3d at 424. TSSAA contends that the "public concern" limitation it seeks – yet another special "dispensation" from standard doctrine – "can [be] readily accommodate[d] [to] this case." Pet. Br. 27. This is a polite concession that the doctrine it advocates is not supported by any decision of this Court. TSSAA seeks to make new law and in the process water down First Amendment protections that attach to any party who voluntarily accepts what TSSAA describes as a governmental benefit.

Again, TSSAA's position is ahistorical. The public employment context begins with the anachronistic Holmes aphorism that public employees enjoy no First Amendment protection, which this Court has "rejected for decades now." *O'Hare*, 518 U.S. at 716-17. Over time, this Court has

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[40] *See United States v. Am. Library Ass'n, Inc.*, 539 U.S. at 211 (2003).

expanded First Amendment protections for public employees, recognizing certain interests but also retaining important prerogatives of government as employer.

While the "government employment cases" require "sensitivity to governmental needs," this Court has warned that "First Amendment rights must not be neglected." *Umbehr*, 518 U.S. at 678. The cases balance the particularized interests of government as employer with the speech interests of employees who speak out as citizens. TSSAA would take a carefully constructed and cabined doctrine – designed to address essentially inside information about the internal operation of government – and give it general application, adapting it to a regulatory setting to which it is ill suited.

The deferential standard applied to public employee speech does not merely result from the contractual relationship between employees and government (or between service-provider contractors and government) but from the special nature of that relationship and the government's interest in performing its role as provider of government services. *Umbehr*, 518 U.S. at 674.

The special circumstances of public employment recognize that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006). No such generalized interest exists in every case in which government forms a contractual relationship. Those who subject themselves voluntarily to government's regulatory authority (or to other contractual relationships) are not functional equivalents of employees.

No such government interest exists here. Brentwood was punished for communicating to its incoming students about an activity TSSAA had approved, not about internal personnel matters at TSSAA. TSSAA's relationship with Carter is altogether different from its relationship with Brentwood. Thus, in the regulatory context, Ms. Ibanez did

not speak on a matter of public concern when she provided information on her letterhead, yet her commercial speech was protected under traditional commercial speech doctrine.[41] And the musical "Hair" was not speech on a matter of public concern but received full, traditional First Amendment protection from government's restraint even though the city was leasing out a city-run theatre (non-sovereign authority).

The implications of a diluted First Amendment are significant. Government contracting is pervasive, and TSSAA's approach would give government a powerful lever of control over the affairs of vast numbers of people (*e.g.*, public beneficiaries) and institutions (*e.g.*, universities). Neither TSSAA nor its friends has carefully explained why the context here – regulation of high school athletics – calls for such a substantial limitation on a private party's ability to speak freely. As the Sixth Circuit properly held, government's interest is reflected in the substantiality of the objectives it pursues and the fit between those objectives and the restraint on speech – not in the private or public subject matter of the speech.

In the public employment context, government limits the speech of and disciplines public employees (and functionally equivalent private contractors). By contrast, government here punishes a private school and harms students and parents who want to receive information from the school. The speech restriction is imposed not *by* a school (an area of education with some deference) but by a government regulator *against* a school – an area in which comparable deference is unwarranted.

### D. TSSAA Cannot Define Away Brentwood's First Amendment Rights.

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[41] Indeed, it is hard to see how most commercial speech in the professional discipline context would qualify as a matter of "public concern" if TSSAA has its way. *See Ibanez, supra.*

TSSAA would adulterate traditional First Amendment protections by defining its regulatory program to preclude Brentwood's speech. Pet. Br. 22-25. While government can broadly define a program's scope, even that authority is not unlimited.[42] In the regulatory setting, this power is much more constrained. The unconstitutional conditions doctrine is a response to the overreaching definitionalist approach, which can render constitutional safeguards nugatory. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) (limiting government's ability to define away property rights); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property").

For both procedural due process and the First Amendment, TSSAA claims its regulations define Brentwood's rights, and Brentwood must take the bitter with the sweet. This "bitter with the sweet" approach was specifically and definitively rejected in *Loudermill*, 470 U.S. at 541, in which this Court held that a state can define an entitlement but, once it does, the procedural protections arise from the due process clause itself. Procedural due process rights cannot be defined away.

*Bellotti* is an example in the First Amendment context. The state argued that corporations are "creatures of the state" and "have only those rights granted to them by the State." This Court rejected the contention that states "are free to define the rights of their creatures without constitutional limit," characterizing such claims as "an extreme position" because it would allow states to deny corporations "the protection of all constitutional guarantees." 435 U.S. at 778 n.14. In providing for the corporate form, states offer a benefit; firms voluntarily choose to accept those benefits and

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[42] *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise").

agree to comply with the requirements. But the voluntary acceptance of the corporate form does not allow states to circumvent traditional First Amendment protections through definitionalism. That "extreme position" was rejected because of its consequences for free expression.

Similarly, commercial speech cases such as *Ibanez* cannot be squared with a definitionalist approach. A government regulator cannot simply define a profession as excluding commercial speech (advertising). This Court's expanded protection of commercial speech in the professional context is incompatible with TSSAA's position – that government can circumvent First Amendment protections by defining its regulatory objectives so as to preclude the exercise of commercial speech rights.

In sum, TSSAA's definitionalist contention is just another unpersuasive obfuscation. As the Sixth Circuit held, TSSAA is acting in a conventional regulatory capacity, and the *source* of its regulatory authority is not determinative of the proper analytical framework. The absence of harm, the absence of evidence of subordination of academics to athletics, and the utter failure to establish either the substantiality of the competitive equity interest or how it is advanced here make this a strong case to affirm on the facts. This case is not a good vehicle for developing nuances of contract/waiver or unconstitutional conditions doctrine.

## III. The Recruiting Rule Is Open To Facial Challenge.

In 2001, the Sixth Circuit applied the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987), to reject Brentwood's facial challenge. Accordingly, the case has proceeded on an as applied basis, "focused on the two alleged recruiting rule violations in question rather than engag[ing] in a wide-ranging attack or defense of the recruiting rule as a whole." 262 F.3d at 558. Misconstruing this Court's "as applied" decisions, TSSAA wants to defend the recruiting rule by resort to the generalized concern about "athletic recruiting," while not allowing this Court to "focus[] on the narrow facts of this case." Pet. Br. 37. TSSAA cannot have it both ways.

The speech punished in this case is non-commercial in character. 262 F.3d at 555. When government punishes specific non-commercial speech under a discretionary "undue influence" standard, this Court analyzes the specific context and the specific speech in question; in the absence of a showing of harm under the particular circumstances, government cannot "justify proscription of the activity," even if "part of a regulatory program aimed at the prevention of undue influence." *In re Primus*, 436 U.S. at 432, 436. In *Primus*, this Court found that no "undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred" and invalidated the punishment (public reprimand). *Id.* at 434-35. Even if Brentwood's speech were solicitation, government cannot discipline non-commercial solicitation "without proof of actual wrongdoing that the State constitutionally may proscribe." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978).

The findings here are similar to those in *Primus*; the lower courts found the SPL and calls to be informative, not harmful, with no indication of exploitation "in theory or fact." 442 F.3d at 428. TSSAA applies the "undue influence" principle on an *ad hoc*, case-by-case basis – in this case to pure speech. As the facts developed, the

recruiting rule does not contemplate a broad prophylactic or categorical ban on all school-initiated, targeted contact. So, TSSAA's assertion that the rule should be viewed in the abstract, not as applied in specific situations, rings peculiarly hollow.[43] Since there is no *per se* categorical "coach contact" or "initial contact" rule, but only an *ad hoc* case-specific "undue influence" rule applied to specific speech or conduct, TSSAA cannot claim that the specific application of the rule need not be justified. Since there is no categorical rule, there is no way to evaluate the application of the rule except by examining its application in specific cases and contexts. *Primus* makes this clear. Otherwise, government would be handed a blank check to restrict speech, without effective judicial review.

This Court's recent unanimous decision in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006), demonstrates the vitality of the *Primus* principle. Although the federal campaign finance law had been upheld against facial attack, this Court expressly allowed an as applied claim to proceed, addressing the constitutionality of applying the general campaign finance law to "several [specific] broadcast advertisements . . . intended to run during the 2004 election." This ruling is not compatible with TSSAA's assertion that it is error to "focus[] on the narrow facts of this case." *See Randall v. Sorrell*, 126 S. Ct. 2479, 2491-92 (2006) (contemplating as applied challenge in specific factual circumstances); *City of Littleton v. Z. J. Gifts D-4, L.L.C*, 541 U.S. 774, 783-84 (2004) (upholding general judicial review for a "simple objective" set of licensing criteria, but allowing as applied challenges in specific cases of censorship or

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[43] For example, it is one thing to uphold a bright-line rule such as a 100 foot campaign free zone around election booths, but quite another to say that a law preventing campaigning so close to an election booth as to constitute "undue influence" on voters cannot be challenged as applied to an interpretation that "undue influence" means a distance of two miles from the election booth. *Cf. Burson v. Freeman*, 504 U.S. 191 (1992).

undue delay). Nor is it compatible with attorney discipline commercial speech cases, such as *Ibanez*, which focus on the application of subjective criteria to specific circumstances.[44]

If TSSAA can sidestep the as applied challenge simply by downplaying or ignoring the specific evidence at trial, then Brentwood should be permitted to reassert its facial challenge.

A facial challenge is permissible here for two reasons. First, in applying the *Salerno* standard to the First Amendment context, the Sixth Circuit erred. Decisions of this Court since 2001 have made clear that the facial challenge standard for First Amendment cases is not that of *Salerno* but rather whether a regulation affecting speech "prohibits a substantial amount of protected expression," whether it "abridges the freedom to engage in a substantial amount of lawful speech." *Ashcroft,* 535 U.S. at 244, 256; s*ee also Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) ("[T]hat a law punishes a 'substantial amount of protected free speech ... suffices to invalidate *all* enforcement of that law"); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Stratton*, 536 U.S. 150, 160 n.9 (2002) (facial challenge standard is whether regulation of expression "abridges so much protected speech that it is invalid on its face").

Second, evidence at trial demonstrated that TSSAA interprets the "undue influence" provision under a highly discretionary, standardless totality-of-circumstances test. Facial First Amendment challenges of excessive discretion are permitted because of the risk of self-censorship, an "evil[] ... that can be effectively alleviated only through a facial challenge.... Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Lakewood*, 486 U.S. at 757; s*ee Forsyth County*, 505 U.S. at 133 & n.10.

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[44] Even a categorical rule must be justified in an as-applied TPM context by reference to the specific circumstances. *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984); *see also* BIO 26-27.

The evidence demonstrates the excessive discretion that TSSAA retains. By any fair measure, application of the recruiting rule results in restriction of a "substantial" amount of First Amendment protected speech. Brentwood and other private schools cannot proactively pursue interests in diversity or generally tell their story; families are inhibited from receiving targeted information from schools about program activities. School-choice experts strongly supported the need for proactive targeted communication to attract students from lower socioeconomic levels and the lack of harm therefrom.[45] JA 305-07, 310-11, 354-57, 359-60.

## IV. TSSAA Violated Procedural Due Process.

Whatever is required by TSSAA's by-laws is immaterial in light of *Loudermill*, 470 U.S. at 541, which holds that procedural protections of entitlements flow from the due process clause itself. And, while waiver of rights can occur, there was no such waiver here for the reasons explained earlier. *See* Section II.A, *supra.* Because Brentwood did not surrender its due process rights in joining TSSAA, the only issue is what process is due. *Mathews*, 424 U.S. at 334-35. This requires sensitive balancing to determine what procedural safeguards are required in particular circumstances. This case involves a punishment for pure speech, in which procedural safeguards are a traditional bulwark of First Amendment protections and impose on government the burden of justification. Here, TSSAA never provided Brentwood with evidence supporting its penalties. Brentwood had the burden throughout to demonstrate its innocence. JA 395, 401; Tr. 1497-98.

This Court has found that one of the "principles [that] have remained relatively immutable in our jurisprudence" is that where the reasonableness of state action depends on

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[45] This Court's charitable solicitation cases provide further support for a successful facial challenge here. *E.g.*, *Village of Schaumburg v. Citizens for Better Env't*, 444 U.S. 620 (1980); *Watchtower*, *supra.*

factual findings, "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). In *Loudermill*, 470 U.S. at 546, the Court held that, at pre-determination, due process required notice of charges, "an explanation of the employer's evidence, and an opportunity to present [one's] side of the story." *Loudermill* also made clear that more robust post-determination procedures pertain, and "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures."[46] *Id.* at 547 n.12. Thus, the limited pre-determination procedures required in *Loudermill*, which were not even present here, do not establish the total scope of process required by due process. Before the punishment became final, Brentwood was entitled to know with particularity what issues were still alive, what evidence TSSAA had and was relying on, and to have an opportunity to respond to issues and evidence "before the penalties are imposed." 442 F.3d at 437. This is what the lower courts held; it is not very burdensome.

The district court found that the "TSSAA Board of Control considered *ex parte*, post-hearing evidence during its private deliberations, to which Brentwood ... had no right of reply." 304 F. Supp. 2d at 1003. That is, the Board "received, considered, and relied upon *ex parte* statements and documentary evidence from Defendant Carter and two TSSAA employees who investigated the allegations against Brentwood." *Id.*; *see also* JA 467-69; 475-76; Tr. 1848-1908. And, Brentwood "had no opportunity to reply to this *ex parte* evidence or even hear it and was prejudiced by the evidence and the private post-hearing process" because the Board considered this evidence in determining the penalty

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[46] Since TSSAA's initial sanctions were effective immediately, the subsequent proceedings are properly considered post-determination, but, as the district court found, the TSSAA procedures do not even satisfy the more modest pre-determination requirements. 304 F. Supp. 2d at 1005.

against Brentwood. 304 F. Supp. 2d at 1003. Further, TSSAA's investigative notes were not made available to Brentwood. *Id.* at 1004-05; JA 393-403; 467-68; 475-76. During this executive session, the conduct of Bart King was discussed, and the district court found that "King was a factor in the penalties imposed," 304 F. Supp. 2d at 1004, even though "[t]here was no indication from the TSSAA before the final hearing ... that [it] was still considering the Bart King allegations."[47] *Id.* at 1004 n.29.

Based on these factual findings, the district court held due process is not satisfied because Brentwood was "not informed of the evidence considered by the decision-maker."[48] *Id.* at 1005. Applying *Mathews*, the district court held that "requiring the TSSAA to present its evidence of a rules violation in the presence of the school alleged to have committed the violation is a fundamental procedural safeguard that would have imposed no, or a very modest, additional administrative burden on the organization, and would have 'contributed substantially to the making of a rational decision.'" *Id.* at 1006. This was particularly true in light of the factfinding that the ex parte, post-hearing evidence was "prejudicial to Brentwood." *Id.* Board of Control President Mike Reed openly testified that "[Bart King] was a factor in the overall penalty." JA 385-86.

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[47] While TSSAA initially indicated that Bart King was of concern, the July 29 violations letter made no mention of King. JA 238-44. Indeed, Carter testified that, as of July 29, King was no longer an issue: "He was out of the picture in terms of, I think, any disciplinary action on our part based on Mr. King." CAJA 756. TSSAA never provided any factual basis for the King allegations and refused to identify whether the withheld evidence even related to King. CAJA 2630. In fact, Carter flatly rejected Brentwood's offer to present Bart King in order to clarify his relationship with the school. JA 267, 300. Thus, the district court finding that Brentwood was "misled" about King's relevance and "denied an opportunity to defend this allegation head on," is fully supported by the record. 304 F. Supp. 2d at 1004 n.29; 442 F.3d at 435 n.20.

[48] In fact, Childress recalled Brentwood "literally pleading" for specific information on the allegations made against the school. JA 467-68.

Upon review, the Sixth Circuit affirmed, holding that due process requires "that a school be informed of all of the issues relied on by [TSSAA]" before it finally levies a penalty, that Brentwood get "notice of the evidence relied upon [by TSSAA] in penalizing Brentwood," and that Brentwood have "a chance to respond to" TSSAA's "issues" and to its "evidence" before penalties were finally imposed. 442 F.3d at 437-38. In particular, "TSSAA failed to give ... notice as it related to King," so Brentwood "had no notice that it should respond to the King evidence," yet the "King evidence was used by the TSSAA in its deliberations" and "influenced the penalties imposed." *Id.* Again, the record supports this conclusion. *See* note 47, *supra*.

These requirements are fully consistent with this Court's due process decisions. As this Court recently held, "notice of the factual basis" of government's adverse decision and a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" are critical elements of due process. *Hamdi*, 542 U.S. at 533 (relying on *Loudermill*). The lower courts appropriately balanced the factors under *Mathews* and reached the correct outcome.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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# APPENDIX

To: Brentwood Academy
From: Joe Marley
Date: 1/21/97

It is our intention for Ray Marley to attend Brentwood Academy in the 1997-98 school year. Ray has my consent to participate in a speed and strength program at Brentwood Academy.

Joe Marley
/s/ Joe Marley

**BRENTWOOD ACADEMY**
219 Granny White Pike
Brentwood, Tennessee 37027
(615) 377-3632
fax: (615) 377-3709

Athletic Director: Carlton Flatt
Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

**Spring practice will begin May 1, 1997 and conclude on May 14, 1997.** Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an ***Eagle***.

Your Coach,
Carlton Flatt